No. 89-7662 (9)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROGER KEITH COLEMAN,

Petitioner,

vs.

CHARLES E. THOMPSON, Warden,
MECKLENBURG CORRECTIONAL CENTER OF THE
COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. After *Harris* v. *Reed*, is it permissible for a federal court to analyze state law and the state court record to determine whether federal claims are barred by state procedural default when the state court summarily grants a motion to dismiss without mentioning federal law?

2. Should a federal court waive a procedural default resulting from post-conviction counsel's failure to file a timely appeal when the default would only bar rehearing of claims already heard and decided once?

3. Does the deliberate bypass standard of *Fay* v. *Noia* have any continuing value as precedent?

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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the extended relitigation of the legality of a proceeding conducted many years ago, involving no substantial question of whether respondent is actually guilty. Such unnecessary relitigation is contrary to the rights of victims and society which CJLF was formed to advance.

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1. Both parties have consented in writing to the filing of this brief.

SUMMARY OF FACTS AND CASE

According to the prosecution's case at trial, Roger Coleman raped and murdered Wanda McCoy, who was then 19, almost ten years ago. The jury found him guilty of rape and of willful, deliberate, and premeditated killing during the commission of the rape: capital murder under Virginia law. *Coleman* v. *Commonwealth*, 307 S. E. 2d 864, 865 (1983).

Evidence of guilt included matches of Coleman's pubic hair with hairs found on Wanda's body, Coleman's blood type with semen found in her body, and Wanda's blood type with a blood stain on Coleman's pants. *Id.*, at 867-868. The Virginia Supreme Court affirmed unanimously, *id.*, at 877, and this Court denied certiorari, *Coleman* v. *Virginia*, 465 U. S. 1109 (1989).

Coleman filed a state habeas petition in the state trial court, and it was heard by a judge other than the trial judge.[2] The state court held an evidentiary hearing. The court made factual findings indicating that (1) Coleman's evidence that a juror was biased was less credible than the state's evidence on the point, J. A. 4-5; (2) trial counsel conducted an adequate investigation, J. A. 16-17; and (3) the lack of mitigating circumstances in the penalty phase was due to Coleman's own actions, J. A. 8, 17.

Coleman's attorneys filed a notice of appeal a day late. They claim to have believed that time runs from the day the clerk records the order rather than the day the judge signs it. J. A. 29, 32.

The state filed a motion to dismiss the appeal as untimely, relying solely on state law. J. A. 22-24. While the motion was pending, the parties filed briefs on the merits. The Virginia Supreme Court issued an order reciting the filing of the various papers and concluding with this statement. "Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." J. A. 25-26.

2. The trial judge was Judge Persin, 307 S. E. 2d, at 864; the habeas judge was Judge Phillips, J. A. 15.

Coleman then filed a federal habeas petition. The district court found that the claims raised for the first time on state habeas were procedurally barred. J. A. 39. However, the court went to rule on the merits as an alternative holding. In denying a further evidentiary hearing, the federal court found that "Coleman was represented by counsel [in the state proceeding], was given a fair opportunity to present any evidence that he wanted to and the court proceeded to rule on all matters that were presented to it." J. A. 40. The court proceeded to find "on the merits that there was no denial of any constitutional rights of Coleman in his trial . . . " and denied relief. J. A. 51-52.

The Fourth Circuit affirmed, upholding the finding of procedural default. *Coleman* v. *Thompson*, 895 F. 2d 139, 144 (1990). The court noted that the Virginia rule regarding time to appeal was clear. *Id.*, at 143.

This Court granted certiorari limited to questions 2, 3, and 4 in the petition, *Coleman* v. *Thompson*, 112 L. Ed. 2d 305 (1990), which are the questions related to the procedural default issue.

SUMMARY OF ARGUMENT

Harris v. *Reed*, 489 U. S. 255 (1989) did nothing more than apply *Michigan* v. *Long*, 463 U. S. 1032 (1983) to habeas corpus. The *Long* rule should be applied on habeas as it has actually been applied on direct review.

Under *Long*, a presumption that the state decision does not rest on independent state grounds arises *only* when the decision fairly appears to rest *primarily* on federal law. Only then is a plain statement to the contrary needed to rebut the presumption.

Generally speaking, summary denials without opinion do not fairly appear to rest primarily on federal law. The *Long/Harris* rule is inapplicable to such decisions. It is both necessary and proper in such cases to examine the pleadings and state law to determine if the judgment rests on independent state grounds.

Fay v. *Noia*, 372 U. S. 391 (1963) has no value as precedent. It was based on a distortion of history; the rule it announced was dictum; it has been completely supplanted by subsequent cases. *Noia* should be formally and completely overruled.

Notwithstanding his protests, Coleman has *not* been denied "any hearing of [his] constitutional claims." Cf. Pet. Cert. question 3. He received a full and fair hearing in the state habeas court. Ineffective assistance on habeas corpus should not be considered "cause" for the reasons stated by the Attorney General.

ARGUMENT

I. *Long* applies only to state decisions which fairly appear to rest primarily on federal law.

A. Long *as Actually Applied.*

The holding of *Harris* v. *Reed*, 489 U. S. 255 (1989) is simply that the rule of *Michigan* v. *Long*, 463 U. S. 1032 (1983) applies to habeas corpus. *Harris*, at 263. While the *Long* rule is referred to as a "plain statement" rule, see *id.*, at 261, that expression is merely shorthand for the holding of *Long* and its progeny. The phrase should not be lifted out of context and applied mechanically; the *Long* rule should be applied on habeas corpus in the same way that it has actually been applied on direct review.

The *Long* rule is a form of presumption. See *Long*, 463 U. S., at 1042, n. 8. "[W]e merely assume that there are no

such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground *and* when it fairly appears that the state court rested its decision primarily on federal law." *Id.*, at 1042 (emphasis added). This is a two-part, conjunctive test. The lack of a plain statement does not raise the presumption unless the second part is also satisfied.

Harris cited six post-*Long* cases, 489 U. S., at 261, n. 7, none of which is based solely on the absence of a "plain statement" from the state court opinion. In *New York* v. *Class*, 475 U. S. 106, 109 (1986), the Court first noted that state and federal cases were used by the state court, "generally citing both for the same proposition." Only after this pattern of parallel citations indicated that the decision was primarily based on federal law did the absence of the "plain statement" become significant. See *id.*, at 109-110.

The *Class* Court did not limit its discussion to the face of the opinion, contrary to what Coleman claims the *Long* rule requires. See Pet. Brief 14-15. In interpreting the state opinion, the Court referred to the state rule against discussing constitutional grounds when statutory grounds resolve the case, citing state case law for that proposition. *Class*, *supra*, 475 U. S., at 110.

In *Delaware* v. *Van Arsdall*, 475 U. S. 673, 678, n. 3 (1986); *New York* v. *P. J. Video, Inc.*, 475 U. S. 868, 872, n. 4 (1986); *Maryland* v. *Garrison*, 480 U. S. 79, 83 (1987); and *Kentucky* v. *Stincer*, 482 U. S. 730, 735-736, n. 7 (1987), this Court specifically noted that the state court had expressly relied on federal authority in reaching its decision. Only then was the absence of a plain statement of independent state grounds dispositive.

Michigan v. *Chesternut*, 486 U. S. 567 (1988) demonstrates that there is no "four corners" limitation in the *Long* rule. Cf. Pet. Brief 18, n. 11. The state court had rested its decision on two state cases. See *People* v. *Chesternut*, 157 Mich. App. 181, 403 N. W. 2d 74, 75-76 (1986). That reliance might initially indicate that the decision did not rest primarily on federal law. However, the *Chesternut* Court went beyond the face of the

state court opinion to review the authorities cited and determined that those precedents were based on federal law and not independent state grounds. 486 U. S., at 571 and n. 3.

Most of the opinions of this Court applying *Long* have been cases where independent state grounds were not found. Decisions which do rest on independent state grounds would generally result in a denial of certiorari and hence no opinion. One exception is *California* v. *Freeman*, 488 U. S. 1311 (1989), an opinion by Justice O'Connor as Circuit Justice denying a stay of the California Supreme Court's decision in *People* v. *Freeman*, 46 Cal. 3d 419, 758 P.2d 1128 (1988).

Freeman involved the prosecution of a film producer for pandering, on the theory that paying actors to perform sexual acts was prostitution. The state court opinion was divided into two main parts. The part titled "First Amendment Considerations" had given the statute a narrow construction to avoid federal constitutional problems, but the part titled "The Statutory Language" had only discussed the words of the statute and their prior construction. 488 U. S., at 1314; see 46 Cal. 3d, at 423-425. Nowhere in the state court opinion is there a specific, self-conscious statement that the two reasons for construing the statute narrowly are independent of each other. That conclusion is inferred from the structure of the opinion. 488 U. S., at 1314.

Caldwell v. *Mississippi*, 472 U. S. 320 (1985) was relied on heavily by the *Harris* Court. See 489 U. S., at 261, 263-265. The *Caldwell* Court also went behind the face of the state court opinion, examining the state procedural bar cases cited in the state court opinion to determine whether the state court had made the requisite statement. 472 U. S., at 327-328. The *Caldwell* Court also emphasized that "the Mississippi court discussed the challenge . . . at some length, evaluating it as a matter of both federal and state law before rejecting it as unmeritorious." *Id.*, at 328.

In short, *Long*'s references to a "plain statement" requirement and the "face of the opinion" come into play only *after* it is determined that the decision fairly appears to rest primarily

on federal law. Sources outside the opinion may properly be considered in making that threshold determination.

B. The Harris *Decision.*

Bearing in mind the *Long* rule as it has actually been applied, we return to the decision in *Harris* v. *Reed*, 489 U. S. 255 (1989). *Harris* itself initially summarized the *Long* rule this way:

> "Under *Long, if 'it fairly appears that the state court rested its decision primarily on federal law,'* this Court may reach the federal question on review unless the state court's opinion contains a ' "plain statement" that [its] decision rests upon adequate and independent state grounds.' " *Id.*, at 261 (quoting *Long, supra*, 463 U. S., at 1042) (footnote omitted, emphasis added).

Throughout the opinion, the Court repeatedly emphasizes that it is doing nothing more than applying the *Long* rule. "Thus, we are not persuaded that we should depart from *Long* and *Caldwell* simply because this is a habeas case." *Harris*, 489 U. S., at 265. At one point, however, there is a critical slip. *Harris* unequivocally announces its intent to adopt the *Long* rule without change and in the same breath misstates the rule:

> "*Caldwell* thus indicates that the problem of ambiguous state-court references to state law, which led to the adoption of the *Long* 'plain statement' rule, is common to both direct and habeas review. Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ' "clearly and expressly" ' states that its judgment rests on a state procedural bar." *Id.*, at 263.

The capsule statement which follows the colon in this passage is ***not*** an accurate statement of the *Long* rule as it has actually been applied by this Court. It omits the critical prerequisite that the state decision first fairly appear to rest pri-

marily on federal law. The omission appears to be inadvertent, and the rule is accurately stated elsewhere in the opinion. See *id.*, at 261, quoted *supra*.

When the *Harris* Court turns to applying the *Long* rule to the case, it notes once again the importance of the state court ruling on the merits of the federal question. The state court's only mention of procedural default had been a statement that the issues could have been raised on appeal and a reference to the state procedural default rule. *Id.*, at 258, 266. *Harris* states that this passing reference might arguably have sufficed "had the state court never reached the federal claim." *Id.*, at 266, n. 13. It was because "the state court *clearly* went on to address the merits," *ibid.* (emphasis added), that the *Long* presumption came into operation. "It is precisely with regard to such an ambiguous reference to state law *in the context of clear reliance on federal law* that *Long* permits federal review of the federal issue." *Ibid.* (emphasis added).

The present case comes to this Court in precisely the opposite context. The clear reliance on federal law which produced the assumption of jurisdiction in *Long*, and in every case which has found jurisdiction under *Long*, is completely absent here.

By its very nature, a summary order denying relief without discussion or citation will never, on its face, create a fair appearance of resting primarily on federal law. That being the case, does the *Harris/Long* rule apply to summary dispositions at all?

II. The *Harris/Long* rule generally does not apply to summary dispositions.

A. Classification of Claims.

The question of whether a claim is procedurally defaulted is often intertwined with the question of whether it has been exhausted. See *Harris* v. *Reed*, 489 U. S. 255, 269 (1989) (O'Connor, J., concurring). The *Harris* presumption rule is thus one facet of the larger question of how to classify a claim.

Claims presented on federal habeas corpus can be classified into five categories depending on their procedural history in the state courts: (1) unexhausted claims; (2) procedurally barred claims; (3) claims rejected on the merits by the state courts; (4) claims fairly presented to but ignored by the state courts; and (5) claims for which there is not and never has been effective state corrective process.

Unexhausted claims may not be considered on federal habeas at all if the state objects. 28 U. S. C. § 2254(b); cf. *Granberry* v. *Greer*, 481 U. S. 129, 134-135 (1987) (discretionary if state omits objection). Even a single unexhausted claim requires dismissal of the entire petition. *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982). The exhaustion rule does not apply, however, in the "absence of available State corrective process or the existence of circumstances rendering such process ineffective . . . . " 28 U. S. C. § 2254(b). Hence claims in the fifth category above may be considered.

The exhaustion requirement is met if a claim is fairly presented to the state courts but ignored by them. When the state court decision does not mention the claim it is both necessary and proper to go behind the opinion and examine the pleadings to determine whether the claim was presented and on what grounds it was opposed. See *Castille* v. *Peoples*, 489 U. S. 346, 350-351 (1989); *Smith* v. *Digmon*, 434 U. S. 332, 333 (1978) (per curiam). A determination that the claim has been exhausted is a prerequisite to the application of the *Harris* rule. See *Harris* v. *Reed*, 489 U. S. 255, 263, n. 9 (1989). Where the decision in question is an unexplained summary denial, therefore, it will *always* be necessary to examine the pleadings in order to classify the claim.

When a federal question is presented to a court in a petition other than a direct appeal as of right, there are several reasons why that petition might be denied. The question might be one which should not be normally presented in an original proceeding in an appellate court, even though that court technically has jurisdiction. See, *e.g.*, Supreme Court Rule 20.4(a) (habeas corpus). Summary denial in such cir-

cumstances is not a decision on the merits.[3] The petition may be a petition for discretionary review which may be denied even if the decision below is incorrect. See *Brown* v. *Allen*, 344 U. S. 443, 491 (1953); *Castille* v. *Peoples*, *supra*, 489 U. S., at 351. Such denials express no view on the merits. *Brown*, *supra*, 344 U. S., at 492. If the denial is for either of these reasons, the claim may be unexhausted if there is another state court which will hear the claim on the merits. See *Peoples*, *supra*, 489 U. S., at 351-352.

If the petition is neither inappropriate nor discretionary, a decision on a fairly presented federal question will be based either on a procedural bar or on the merits.[4] Can it be said that a summary denial without discussion or citation fairly appears to rest primarily on federal law? That is the predicate fact which brings the *Harris/Long* presumption into force. *Harris*, *supra*, 489 U. S., at 261. The answer lies in the pleadings.

The federal habeas court presented with state court orders or opinions not mentioning the federal question must first examine the pleadings to determine exhaustion under *Smith* v. *Digmon*, *supra*. If in these pleadings the state has opposed the claim solely on the merits, then it may be said that the state court decision fairly appears to rest on federal law. While the state court might search out a procedural default on its own and rule on that basis without briefing or argument, such action is unlikely. When a party makes only one argument, "the most reasonable explanation," *Long*, *supra*, 463 U. S., at 1041, for an unexplained ruling in that party's favor is acceptance of that argument. By the same reasoning, the grant of a motion to dismiss based solely on procedural bar is most reasonably explained as resting on the procedural bar.

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3. This point is discussed at length in our brief in *Ylst* v. *Nunnemaker*, No. 90-68.

4. An opinion ignoring the federal question is effectively the same as denial on the merits. See *Smith* v. *Digmon*, *supra*.

B. Arguably Barred Claims.

Most advocates, of course, will defend their judgments on both substantive and procedural grounds when both are available. When substantial arguments on both the merits and an adequate and independent state procedural bar have been presented, a summary denial does not indicate a preference for either. The decision in such a case does not fairly appear to rest *primarily* on federal law. The predicate for the *Harris/Long* presumption is missing.

What should a federal habeas court do when the *Harris* rule does not apply? The answer lies not in *Harris*, but in the two other habeas cases decided the same day. In *Teague* v. *Lane*, 489 U. S. 288 (1989),[5] petitioner raised a claim under *Swain* v. *Alabama*, 380 U. S. 202 (1965) for the first time on federal habeas corpus. *Teague*, at 297. Under Illinois law, failure to raise a claim at trial or on appeal forfeits the claim, subject to a "fundamental fairness" exception. *Ibid*. The *Teague* Court resolved the issue by examining Illinois law and deciding for itself that the exception would not apply. *Id*., at 297-298. "The rule announced in *Harris* v. *Reed* . . . is simply inapplicable in a case such as this one, where the claim was never presented to the state courts." *Id*., at 299.

Castille v. *Peoples*, 489 U. S. 346 (1989) goes a step further. In that case the federal question had been presented to a state court, but only in a petition for discretionary review. *Id*., at 347. This petition alone was insufficient for exhaustion, *id*., at 351, but further inquiry was warranted.

> "The requisite exhaustion may nonetheless exist, of course, if it is clear that respondent's claims are now procedurally barred under Pennsylvania law. See, *e.g.*, *Engle* v. *Isaac*, 456 U. S. 107, 125-126, n. 28 (1982);

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5. Part III of *Teague* is a majority opinion. See *id*., at 316 (White, J., concurring in part).

Teague v. *Lane*, *ante*, at 297-298. We leave that question for the Court of Appeals." *Id.*, at 351-352.

Thus the *Teague* approach to procedural bar, *i.e.*, deciding the issue without the use of *Harris*-type presumption, is not limited to cases where the claim was *never* presented to the state courts. It also applies to a case where the claim was summarily denied on a discretionary petition, probably for reasons other than the merits.

The present case does not fall squarely within the ambit of either *Harris* on the one hand or *Teague* and *Peoples* on the other. The rationale of one or the other must be extended to cover this situation. Amicus submits that the *Long* rule has already been stretched to the limit in *Harris* and that the present case should be governed by *Teague*.

In part II-C of the opinion, the *Harris* Court discusses and dismisses the asserted reasons why the *Long* rule should not apply to habeas corpus. However, there are some important differences between direct review and habeas corpus which are not mentioned in this section. First, when this Court reverses on a federal question on direct appeal and remands, the case merely goes back to the state courts with the federal error corrected. The state courts can and frequently do reassert state grounds at that point and reinstate the earlier result. See, *e.g.*, *People* v. *P. J. Video, Inc.*, 68 N. Y. 2d 296, 501 N. E. 2d 556 (1986) on remand from *New York* v. *P. J. Video*, 475 U. S. 868 (1986); *Van Arsdall* v. *State*, 524 A. 2d 3 (Del. 1987) on remand from *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986). The interference with state courts is far greater on habeas corpus. The state court gets no second chance to clarify the basis for its ruling.

Second, the limitation on this Court's jurisdiction avoided by the *Long* rule is absolute. If ambiguity precludes jurisdiction, a grave injustice committed by a court which erroneously believes itself to be bound by federal precedent, see, *e.g.*, *People* v. *Chesternut*, 157 Mich. App. 181, 403 N. W. 2d 74, 76 (1986), reversed *Michigan* v. *Chesternut*, 486 U. S. 567 (1988), may go uncorrected. The procedural default bar to habeas

review, in contrast, has the substantial exception of cause and prejudice, which will redress most cases of unjust results, backed up by the " 'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." *Harris*, *supra*, 489 U. S., at 271 (O'Connor, J., concurring). This built-in exception makes the *Long* rule less necessary on habeas than it is on direct review.[6]

Third, *Long* was concerned with this Court's limited ability to interpret the laws of all fifty states. 463 U. S., at 1039. Federal district courts do not have that problem. See *Harris*, *supra*, 489 U. S., at 283 (Kennedy, J., dissenting). Furthermore, the lower federal courts must necessarily be familiar with state procedural default law in order to apply the exhaustion doctrine, see *Peoples*, *supra*, 489 U. S., at 351, and to determine procedural default of claims never presented to a state court. *Harris*, at 269-270 (O'Connor, J., concurring).

Finally, there was a consideration in favor of review present in *Long* and present to a lesser degree in *Harris*, but which is not present at all in this case. The *Long* Court was concerned that ambiguous state court opinions addressing federal questions would create a body of federal case law which was insulated from this Court's review. 463 U. S., at 1040 and 1042-1043, n. 8. The need for uniformity could be met only by a decision by this Court.

This consideration has less weight on habeas corpus, even where there is a full, published state opinion. A lower federal court decision does not create uniformity because it is not *stare*

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6. Justice Stevens' diametrically opposed view appears to be based on a belief that reversal of convictions is never an injustice, but merely a state "overprotecting" its citizens. See *Harris*, *supra*, 489 U. S., at 267 (concurrence); *Van Arsdall*, *supra*, 475 U. S., at 695-697 (dissent). It is unlikely that the child victims in *Kentucky* v. *Stincer*, 482 U. S. 730 (1987) felt "overprotected" by their state court. See also *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934) (justice due also to the accuser).

decisis in state courts.[7] Nonetheless, federal habeas review may prompt states to reconsider and overrule erroneous decisions.

This problem is completely absent, however, in the case of summary denials which may be based on procedural default. Summary orders such as the one in the present case will generally not be reported at all, see generally R. Stern, *Appellate Practice in the United States* 480-482 (2nd ed. 1989) (criteria for publication), and even where they are they will have little or no weight as precedent. In California, for example, simple denials are printed only in the court minutes in the advance sheets and are not preserved in the permanent official reports.

The main impetus behind *Harris* seems to be a desire to simplify habeas corpus litigation. Habeas corpus is indeed complex, and simplicity is indeed a virtue, but simplicity does not override all other values. The ultimate simplicity would be to return to the rule of *Ex parte Watkins*, 3 Pet. (28 U. S.) 193, 203 (1830) that conviction by a court of unquestioned jurisdiction cannot be collaterally attacked, period. No one is suggesting that.

Whether simplicity justifies a presumption in summary denial cases is an open question. The *Harris* Court did comment on summary dispositions in footnote 12. However, this comment was merely in response to a statement in the dissent. The issue was not actually presented in the case before the Court. Footnote 12 is dictum, not a holding of the case.

It is one thing to presume the absence of independent state grounds "in the context of *clear* reliance on federal law." *Harris*, *supra*, 489 U. S., at 266, n. 13 (emphasis added). It is quite

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7. In *State* v. *Vickers*, 768 P. 2d 1177, 1188, n. 2 (Ariz. 1989), for example, the Arizona Supreme Court refused to accept the Ninth Circuit's decision in *Adamson* v. *Ricketts*, 865 F. 2d 1011 (1988) that jury sentencing was constitutionally required in capital cases. The state court was right; the federal court was wrong. *Walton* v. *Arizona*, 110 S. Ct. 3047, 3054-3055, 111 L. Ed. 2d 511, 524-525 (1990).

another to insist that state courts begin inserting explanations into previously unexplained summary denials, particularly those of the state's highest court. For the reasons discussed more fully in the Brief Amicus Curiae of the Criminal Justice Legal Foundation in *Ylst* v. *Nunnemaker*, No. 90-68, the intrusion into the inner workings of state supreme courts would be substantial.

The correct rule, amicus submits, is this. The *Harris/Long* presumption, by definition, applies only "in the context of clear reliance [by the state court] on federal law." A summary denial constitutes such clear reliance *only* when the petition is opposed by the state solely on the merits. If a motion is made to dismiss solely on the basis of a state procedural rule and if there is no exception to the rule intertwined with federal law, cf. *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985), a grant of the motion conclusively establishes a procedural default. In all other cases, there is no presumption either for or against independent state grounds, and the federal habeas court should address the procedural default in the same manner which this Court addressed it in *Teague*.[8]

III. *Fay* v. *Noia* has no value as precedent.

Coleman asks this Court to breathe new life into *Fay* v. *Noia*, 372 U. S. 391 (1963). He cites *Presnell* v. *Kemp*, 835 F. 2d 1567, 1577 (CA11, 1988) for the proposition that *Noia* is not "a dead letter." Pet. Brief 40, n. 32. Amicus submits that just the opposite is true. *Noia* has been dead for years; it is high time it was buried.

There are three reasons for not following *Noia* as precedent: the decision itself, the erosion of its precedential value by later cases, and the failure of its rule to adequately respect the state's interest in finality.

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8. This statement of the rule assumes no earlier state opinions on the issue. That question is addressed in *Nunnemaker*.

A. The Noia *Decision.*

After the summary of the facts, the *Noia* opinion launches into what may be the most extensive distortion of history in the annals of jurisprudence. *Noia*'s departures from reality cannot be cataloged in the short space allotted for an amicus brief. Fortunately, they do not need to be, for they are fully and devastatingly described in more learned sources. First, there is the characteristically scholarly dissent by Justice Harlan. *Noia*, 372 U. S., at 449-463. *Noia*'s version of the history of the common law writ is fully refuted in Oaks, *Legal History in the High Court — Habeas Corpus*, 64 Mich. L. Rev. 451 (1966). The true story of the legislative history is given in Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31 (1965). Justice Powell branded the *Noia* version of history "revisionist" in *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 252 (1973) (concurrence) although he generously attributed his differences to "recent scholarship." *Id.*, at 253.

This rewrite of history was apparently thought to be necessary to justify the next step: ignoring a landmark precedent squarely on point. In *Brown* v. *Allen*, 344 U. S. 443 (1953), this Court considered three cases together. Procedural default was an issue in the case of the third petitioner, Daniels.

Daniels' case was similar to the present case. His counsel filed the appeal a day late, and it was stricken as untimely. *Brown* equated failure to appeal with failure to object. *Id.*, at 486. Significantly, the *Brown* Court noted that the state procedural default rule did not itself violate the Constitution. *Ibid.* The Court concludes Daniels' case with this paragraph:

> "Finally, federal courts *may not* grant habeas corpus for those convicted by the state except pursuant to § 2254. See note 17, *supra*. See also note 2, *supra*. We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief; p. 447, *supra*, but *clearly the state's procedure for relief must be employed* in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. *A failure to use a state's available remedy*, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, *bars federal habeas corpus*. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to *empower* the Federal District Court to issue the writ. The judgment *must* be affirmed." *Id.*, at 486-487 (emphasis added).

Words do not get much clearer than these. Although the procedural default rule has exceptions, where the rule applies it is mandatory and jurisdictional, not discretionary and based on comity. Yet after mentioning Daniels' case briefly, *Noia* says "The point is that the Court, by relying upon a rule of discretion, avowedly flexible, . . . , has refused to concede jurisdictional significance to the abortive state court proceeding." *Noia*, *supra*, 372 U. S., at 426. That statement is quite simply false.

It is one thing to carefully consider a past decision, decide it was ill-advised, and honestly overrule it. It is quite another to simply pretend that a precedent does not say something which it unquestionably does say.

> "[The] doctrine [of stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While stare decisis is not an inexorable command, the careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' " *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986).

Given the importance of the doctrine, is a case entitled to any more respect *as* stare decisis than the case itself paid *to*

stare decisis? Amicus submits that it is not. If responsible judges are duty bound to abide by irresponsible precedents, our law will very quickly degenerate.

Third, and finally, *Noia* commits the cardinal sin of Article III adjudication: it announces a rule which it does not apply to the case before it. See *Wainwright* v. *Sykes*, 433 U. S. 72, 95-96, n. 3 (1977) (Stevens, J., concurring). Noia had counsel, knew he had the right to appeal, and specifically decided not to. *Noia*, 372 U. S., at 397, n. 3. A bypass more deliberate can scarcely be imagined.

The Court decided that Noia's clearly deliberate bypass would not be deemed deliberate because he had a good reason: fear of a death sentence on retrial. *Id.*, at 440. This result is better explained by the *Sykes* test than it is by the *Noia* test. The Court believed Noia had good *cause*, and the fate of the co-defendants leaves no doubt as to prejudice. See *id.*, at 395-396.

The failure of *Noia* to apply its own test provides the best reason for not accepting the deliberate bypass test as precedent. It is pure obiter dicta. See *Sykes*, *supra*, 433 U. S., at 87. As such, it has never been precedent. *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821).

B. Subsequent Developments.

Noia made two substantial changes in the law. It replaced the absolute bar of defaulted claims with the "deliberate bypass" test, and it rejected both exhaustion and independent state grounds as bases for the procedural default rule. Neither of these holdings is the law today.

Davis v. *United States*, 411 U. S. 233 (1973) introduced "cause and prejudice" into the procedural default lexicon. *Davis* held that Fed. Rule Crim. Proc. 12(b) was an express waiver provision enacted by Congress with a specific standard for exceptions. That standard could not properly be defeated by permitting collateral review upon a lesser standard. *Id.*, at 242.

Francis v. *Henderson*, 425 U. S. 546 (1976) extended *Davis* to similar claims by state prisoners. Considerations of federal/state comity require at least as much respect for state waiver rules as for federal rules in similar circumstances. *Id.*, at 541-542. As noted above, *Wainwright* v. *Sykes* specifically rejected the *Noia* rule as dictum. *Reed* v. *Ross*, 468 U. S. 1, 10-11 (1984) confirmed that *Sykes* applied to appellate defaults. *Murray* v. *Carrier*, 477 U. S. 478, 490-492 (1986) eliminated any lingering doubt on that point.

Coleman still asserts *Noia* as authority for the deliberate bypass test when there has been no appeal at all. Pet. Brief 39-40. For the reasons discussed in part C, below, this is a distinction without a difference.

Noia's rejection of exhaustion as the basis for the procedural default rule, 372 U. S., at 434-435, still stands. *Brown* v. *Allen*, *supra*, is effectively overruled on this point. *Noia*'s adoption of the *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) waiver standard, however, is rejected by *Sykes*, *supra*, 433 U. S., at 87-88. *Sykes* itself did not explicitly fill in the doctrinal gap, however. It referred at different points to comity and federalism, *id.*, at 84, 88, and to independent state grounds. *Id.*, at 81.

Harris v. *Reed*, 489 U. S. 255 (1989) has now clarified the doctrinal vagueness of *Sykes*.

> "The confusion among the courts evidently stems from a failure to recognize that the procedural default rule of *Wainwright* v. *Sykes* has its historical and theoretical basis in the 'adequate and independent state ground' doctrine. 433 U. S., at 78-79, 81-82, 87. Once the lineage of the rule is clarified, the cure for the confusion becomes apparent." *Id.*, at 260 (footnote omitted).

The last vestige of *Noia* was supplanted in *Harris*. The independent state ground doctrine is now firmly established as the theoretical basis of the procedural default rule. Yet the magic word "overruled" has never been attached to *Noia*. The decision is something like the Cheshire Cat. See L. Carroll,

Alice's Adventures in Wonderland ch. 6 (1865). It is still cited as precedent even after everything of substance has disappeared. See Pet. Brief 40 and cases there cited.

C. The State's Interest in Finality.

The "deliberate bypass" test of *Fay* v. *Noia* is, in reality, an abolition of all state procedural requirements for the assertion of federal rights. So long as the defendant does not personally and intentionally waive the right in the sense of *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), he can assert it at any time he pleases. The only "sanction" which the state can invoke for disregard of its rules is to throw Br'er Rabbit into the briar patch by sending him directly to federal court.

The post-*Noia* cases have all had more respect for the integrity of the state courts. Cases involving trial or pre-trial defaults have emphasized the need for on-the-spot correction by the trial court. See *Davis* v. *United States*, 411 U. S. 233, 241 (1973); *Wainwright* v. *Sykes*, 433 U. S. 72, 88-89 (1977). The appellate default cases have recognized the need to resolve all issues at the earliest possible time. See *Reed* v. *Ross*, 468 U. S. 1, 10 (1984); *Murray* v. *Carrier*, 477 U. S. 478, 490-491 (1986).

The common thread running through all these cases is a balancing of the interests. "On the one hand, there is Congress' expressed interest in providing a federal forum for the vindication of constitutional rights of state prisoners . . . . ¶ On the other hand, there is the State's interest in the integrity of its rules and proceedings and the finality of its judgments . . . ." *Reed* v. *Ross*, *supra*, 468 U. S., at 10.

Petitioner attempts to distinguish the entire cause and prejudice line of cases by looking microscopically at *Sykes* and *Carrier* and noting that the very specific finality interests mentioned in each one are not present in this case. Pet. Brief 42-44. *Reed* v. *Ross*, however, recognized the state's interest in broader terms. The integrity of the state's rules and proceedings and the finality of its judgments would be severely impaired by a rule which effectively sweeps aside the state's deadlines for appeals.

Browder v. *Director, Ill. Dept. of Corr.*, 434 U. S. 257 (1978) recognizes the importance of time deadlines on appeals. *Browder* noted that Fed. Rule App. Proc. 4(a) applies to habeas corpus, *id.*, at 265, n. 9, and held that the civil rules in question also applied. *Id.*, at 271. The Court had this to say about the importance of time limits:

> "The purpose of the rule is clear: It is 'to set *a definite point of time when litigation shall be at an end*, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose.' " *Id.*, at 264 (quoting *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412, 415 (1943) (emphasis added)).

For this reason, the time limit was held to be "mandatory and jurisdictional." *Ibid.* When the losing party in a federal habeas corpus case defaults under Rule 4(a) and 28 U. S. C. § 2107, the Court of Appeals lacks the *power* to review the judgment. Strict time limits are "thoroughly consistent with the spirit of the habeas corpus statutes." *Id.*, at 271.[9]

If the federal courts will strictly enforce time limits in federal habeas proceedings, why should the state's time limits be entitled to any less respect? Cf. *Francis* v. *Henderson*, 425 U. S. 536, 541-542 (1976). The state's interests in finality are just as important as in the other cause and prejudice cases, and they call for the same compromise result. Neither the absolute, jurisdictional bar of *Brown* v. *Allen* nor the virtually unlimited review of *Fay* v. *Noia* is called for here. The cause and prejudice test remains the appropriate balance.

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9. The would-be appellant in *Browder* was the state, but nothing in the opinion or in the statutes or rules on which it is based suggests that the result would be different if the roles were reversed.

D. Conclusion.

As we stated at the beginning of this section, *Fay* v. *Noia* has been dead for years. It is time to give it a burial, respectful or not. Cf. *Gideon* v. *Wainwright*, 372 U. S. 335, 349 (1963) (Harlan, J., concurring). *Noia* should be explicitly overruled.

CONCLUSION

The reasons why ineffective assistance on collateral review should not be considered "cause" are well stated in the brief of the Attorney General, and amicus will not burden the Court with repetitive argument here. We will make one additional point, however. Coleman's claim that he has been denied *any* review of his claims, Pet. Cert. question 3, is simply incorrect.

Coleman's claims in this matter have been reviewed either by the state supreme court on direct appeal or by the state habeas court. What he seeks now is not initial review but repeated review.

Yet despite the fact that Coleman was convicted of a terrible crime in a proceeding which has been reviewed and found free of reversible error, the contention will surely be made that Coleman will be executed "because" of his lawyers' mistake. Cf. *Butler* v. *McKellar*, 110 S. Ct. 1212, 1225-1226, 108 L. Ed. 2d 347, 366 (1990) (Brennan, J., dissenting). Such accusations are nonsense. If this Court affirms, Coleman will be executed *because* he raped and murdered Wanda Faye McCoy.

The decision of the Court of Appeal for the Fourth Circuit should be affirmed.

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Respectfully submitted,

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